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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

K. H., C.V., W.L., J.M., JEFFREY BOYER,
BRIAN PIEROG, DONNA BAXTER,
RICHARD DEVIVO, and GARY
MCCONAGHY, on behalf of themselves and
those similarly situated,

Plaintiffs,

v.

THE SECRETARY OF THE DEPARTMENT OF
HOMELAND SECURITY,

Defendant.

Case No.: 3:15-cv-02740-JST

**JOINT NOTICE OF MOTION AND
MOTION AND MEMORANDUM IN
SUPPORT OF FINAL APPROVAL OF
COLLECTIVE ACTION AGREEMENT**

Date: July 12, 2018

Time: 2:00 p.m.

The Honorable Jon S. Tigar

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NOTICE OF THE MOTION AND MOTION

PLEASE TAKE NOTICE that on **July 12, 2018 at 2:00 p.m.**, or soon thereafter as the matter may be heard in Courtroom 9, 19th Floor, of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, plaintiffs' counsel, on behalf of the opt-in Federal Air Marshal plaintiffs, and defendant will and hereby do move the Court for an order granting final approval of the Collective Action Settlement Agreement and Release.

As discussed in the accompanying Memorandum of Points and Authorities, the parties have reached an agreement which has been approved by all 185 opt-in plaintiffs. The parties and counsel thus respectfully request that the Court grant final approval to the settlement.

This joint motion is based on this notice, the Memorandum of Points and Authorities submitted herewith, the declarations attached hereto, the pleadings, records, and files in this action, and such other written or oral argument as may be presented at or before the time this motion is taken under submission by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

On June 18, 2015 plaintiff K.H., then a Federal Air Marshal (“FAM”), filed a complaint on behalf of himself and those similarly situated against the Secretary of the Department of Homeland Security. The complaint was subsequently amended to add additional plaintiffs and revise various allegations included in the original complaint. The second amended complaint alleged that the Transportation Security Administration targeted the Federal Air Marshal Service’s Field Offices in Cincinnati, Cleveland, Phoenix, Pittsburgh, San Diego, and Tampa for closure because those Field Offices had the highest percentage of older FAMs. Hence, the complaint alleged that the office closure decision was driven by age bias and discriminatory motive rather than risk-based analysis or security considerations.

Following a hearing on June 9, 2016, this Court granted the plaintiffs’ motion to approve notice of the collective action and to conditionally certify the class (ECF 56). Discovery continued through 2016 and 2017. Following conclusion of discovery, and before the trial scheduling, the parties participated in a settlement conference before Magistrate Judge Laurel Beeler, which was conducted on February 23, 2018. As a result of that settlement conference, the parties entered into a conditional agreement to settle all issues pertaining to this lawsuit, and to enter into a written settlement agreement, a redacted copy of which is attached hereto as Exhibit 1.¹

As of the date of the settlement conference, the class consisted of 185 party plaintiffs who had previously opted into the case. One of the conditions of the settlement was that all 185 individual plaintiffs had to personally sign the settlement agreement and agree to the terms and distributions contained therein. For purposes of this motion, it is significant that, in fact, all 185

¹ The names of the current Federal Air Marshals are Sensitive Security Information (“SSI”), as defined by federal regulation 49 C.F.R. § 1520.5. The Transportation Security Administration has a SSI committee that reviews court filings for SSI redaction. See generally 49 C.F.R. § 1520.5. The SSI committee is in the process of preparing a more narrowly-redacted version of the settlement agreement for public filing, and should have it ready within the next two weeks. Once the official SSI redaction is available, defendant will file the unredacted copy of the settlement agreement under seal (in accordance with the Court’s procedures) and will publicly file the official SSI-redacted version.

1 party plaintiffs have agreed to the terms of this agreement and have signed the settlement
2 agreement indicating their acceptance of the terms and conditions contained within it.

3 Plaintiffs, counsel for plaintiffs and defendant jointly submit this motion for approval of
4 the collective class action settlement agreement. Unlike many class settlements governed by
5 Federal Rule of Civil Procedure Rule 23, in this case there are no absent class members whose
6 interests the Court must be concerned with. All plaintiffs have agreed to the settlement, and
7 accordingly there is strong support for the Court to approve the terms of this agreement in light of
8 this universal approval by the class members.

9 The terms of the settlement agreement, which includes an award of 56 hours of leave to
10 active FAMs and a payment of \$1,500 to former FAMs, factored in the risks and contingencies to
11 plaintiffs should this matter proceed to trial. The defendant took an aggressive position with
12 respect to liability in this case, significantly challenging allegations of age discrimination. In fact,
13 defendant submits that there is substantial evidence to demonstrate that the office closure decision
14 was based on risk assessment, not age discrimination, and that plaintiffs would recover nothing
15 were this matter to go to trial. For plaintiffs, recognition was given to the fact that even if liability
16 was determined, there was a question as to the nature and extent of available damages and the
17 extent to which individual class members had lost pay as a result of the closure order. All
18 plaintiffs are receiving significant compensation in light of the factual background of this matter.

19 Although the caselaw is less than pellucid, it appears to the defendant government that
20 Court approval is required for this settlement, and the parties thus request that the Court approve
21 this settlement.

22 This action is a “collective action,” governed by the procedures set forth in Section 16(b)
23 of the Fair Labor Standards Act (“FLSA”). *See Church v. Consol. Freightways, Inc.*, 137 F.R.D.
24 294, 298-99 (N.D. Cal. 1991) (“[T]he ADEA shall be enforced using certain of the powers,
25 remedies, and procedures of the FLSA. A special kind of ‘opt-in’ class action may be brought
26 under one of the FLSA incorporated provisions, 29 U.S.C. § 216(b)[.]”). According to caselaw in
27 this District, “settlements of collective action claims under the FLSA . . . require court
28 approval.” *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014); *see also Jones*

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26 under one of the FLSA incorporated provisions, 29 U.S.C. § 216(b)[.]”). According to caselaw in
27 this District, “settlements of collective action claims under the FLSA . . . require court
28 approval.” *Nen Thio v. Genji, LLC*, 14 F. Supp. 3d 1324, 1333 (N.D. Cal. 2014); *see also Jones*

1 *v. Agilysys, Inc.*, No. C 12-03516 SBA, 2013 WL 4426504, at *2 (N.D. Cal. Aug. 15, 2013)
 2 (“Settlements of private collective action claims under the FLSA also require court approval.”);
 3 *Lopez v. Nights of Cabiria, LLC*, 96 F. Supp. 3d 170, 175 (S.D.N.Y. 2015) (“The trend among
 4 district courts is nonetheless to continue subjecting FLSA settlements to judicial scrutiny.”).

5 Accordingly, plaintiffs, counsel for plaintiffs and defendant respectfully request that the
 6 Court grant this motion and approve the settlement.

7 **II. FACTS.**

8 As set forth above, plaintiffs allege that the Transportation Security Administration
 9 (“TSA”) targeted the Federal Air Marshal Service’s (“FAMS”) Field Offices in Cincinnati,
 10 Cleveland, Phoenix, Pittsburgh, San Diego, and Tampa for closure because those Field Offices
 11 have the highest percentage of older FAMS. FAC ¶¶ 13-14. Plaintiffs contend that it is/was the
 12 TSA’s intent to purge older FAMS from its workforce and/or that the discriminatory office
 13 closures had/have a disparate impact on the TSA’s older workforce. FAC ¶¶ 15-16.

14 All opt-in plaintiffs were over 40 years of age at the time the closure decision was made.

15 Defendant contends that plaintiffs lack any real evidence disputing that FAMS made the
 16 closure decision for risk-based and efficiency reasons, and would present substantial evidence
 17 documenting the risk-based reasons for the closure decision at trial. Defendant also pointed out
 18 that plaintiffs could not dispute that there was only a slightly-over-three-year age difference
 19 between the average age of the FAMS at the closed and non-closed offices. This Court
 20 previously held this “3-year age difference reported by plaintiffs’ expert is insufficient to support
 21 an inference of discrimination,” and granted summary judgment in favor of defendant on
 22 plaintiffs’ disparate impact claims. (ECF 103 at 9). Defendant submits that it is thus highly
 23 doubtful that the plaintiffs would prevail at trial, which would necessarily rely on the theory that
 24 the FAMS decided to close six offices in order to drive down the average age of the entire FAMS
 25 workforce by three years.

26 **III. ARGUMENT.**

27 **A. Legal Standard.**

28 The class action format under the ADEA is not guided by FRCP 23, but instead, the

standards of 29 U.S.C. § 216(b) are utilized which allows employees to bring a collective age discrimination action “on behalf of themselves and other employees similarly situated.” *Sperling, supra*, 493 U.S. at 170; *see Flores v. Velocity Express, Inc.*, 12-CV-05790-JST, 2013 WL 2468362, at *5 (N.D. Cal. June 7, 2013) (J. Tigar). In contrast to FRCP 23, which contains an “opt-out” provision, Section 216(b) contains an “opt-in” provision that prohibits any employee from being “a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” 29 U.S.C. § 216(b); *Leuthold v. Destination America, Inc.*, 224 F.R.D. 462, 466 (N.D. Cal. 2004). The determination of whether a collective action under FLSA is appropriate is within the Court’s discretion. *See Adams v. Inter-Con Security Sys., Inc.*, 242 F.R.D. 530, 535 (N.D. Cal. 2007).

By order dated July 18, 2016, this Court granted the motion to approve notice of collective action and to conditionally certify class. Accordingly, notice to all similarly situated FAMS was posted throughout the Agency Field Offices, and ultimately a total of 194 class plaintiffs either opted in or joined this litigation. The parties thereafter engaged in intensive discovery and ultimately settlement discussions. Near the conclusion of discovery, during which 10 plaintiffs were either dismissed from the suit or withdrew their claims, settlement talks began and a court-ordered settlement conference took place on February 23, 2018 before Magistrate Judge Laurel Beeler. The settlement talks resulted in a conditional settlement agreement. Specifically, the settlement fairly compensates affected current or separated Federal Air Marshal class members with valuable consideration consisting either of restored leave time for the current FAM employees or cash payments for FAMs who separated from the service after the date on which the six subject offices closed. Importantly, all 185 named class plaintiffs have signed the settlement agreement, indicating their acceptance of the terms and conditions and agreeing with the distributions and recitals therein. For these reasons, as detailed further below, plaintiffs, counsel for plaintiffs and counsel for defendant respectfully request the approval of the settlement as fair, adequate and reasonable to the class, under prevailing jurisprudence.

Within the context of a lawsuit brought directly by employees against their employer under Section 216(b) to recover back wages for FLSA violations, and upon consideration of

whether the proposed settlement is fair, the District Court may enter a stipulated judgment approving the agreement and dismissing the action. *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 (11th Cir. 1982). Approval is appropriate upon demonstrating that (1) the litigation involves a bona fide dispute, (2) the proposed settlement is fair and equitable to all parties concerned, and (3) the proposed settlement contains a reasonable award of attorneys' fees. *Id.*, 679 F.2d at 1354. Upon consideration of a motion to approve a settlement in an FLSA matter, courts have questioned whether judicial approval of FLSA settlements is required or even appropriate, observing that parties may, with certain exceptions, manage the resolution of their cases independent of judicial intervention under application of FRCP 41. *See Picerni v. Bilingual Seit & Preschool, Inc.*, 925 F.Supp.2d 368, 375 (E.D.N.Y. 2013); *Martinez v. Bohls Bearing Equipment Co.*, 361 F.Supp.2d 608, 618-31 (W.D. Tex. 2005). Because the issue is still under development, and there is caselaw in this District indicating that approval is required, the parties have submitted this motion for Court approval of the settlement of this collection action. *See Nen Thio v. Genji, LLC*, 14 F.Supp.3d 1324, 1333 (N.D. Cal. 2014) ("[S]ettlements of collective action claims under the FLSA . . . require court approval.").

IV. TERMS OF THE CLASS SETTLEMENT.

The Settlement provides substantial benefits to current and former Federal Air Marshals. The parties were ordered to a settlement conference by this Court which was conducted on February 23, 2018. Magistrate Judge Laurel Beeler orchestrated a day-long settlement discussion, resulting in the conditional settlement agreement which has now been approved by all opt-in plaintiffs.

Pursuant to the stipulated settlement agreement and proposed order, attached hereto as Exhibit 1, class-wide settlement consideration will consist of either:

1. For all class members who have separated from the Federal Air Marshal Service as of the date of execution of the agreement, a cash payment of \$1,500.00. There shall be no withholding from this amount. Checks will be made payable to each individual plaintiff and mailed to plaintiffs in care of class counsel.

.....

1 2. Each plaintiff who as of the date of execution of the agreement remained employed
2 with the Federal Air Marshal Service will receive seven additional days of leave
3 credited to their Federal Service records. This will be reflected as 56 hours of restored
4 annual leave in the Federal Air Marshals Service's timekeeping system. The leave
5 will be managed in accordance with TSA policy and may be carried over for use
6 through the end of 2019.

7 **V. ATTORNEYS' FEES**

8 None of the settlement benefits for Class Members will be reduced to pay attorneys' fees
9 or to reimburse expenses of Settlement Class Counsel. Defendant will pay attorneys' fees and
10 costs separately from, and in addition to, the Settlement benefits to Class Members.

11 Further, the attorneys' fees component of the settlement agreement is fair and reasonable.
12 The fees are significantly discounted and are in proportion with plaintiffs' recovery. In addition,
13 plaintiffs' counsel devoted hundreds of hours of work to this matter, which included but was not
14 limited to: opposing multiple motions to dismiss, requesting and obtaining conditional
15 certification, and opposing a summary judgment motion. Discovery in this matter was also
16 significant and costly. The parties took approximately 28 depositions in various states across the
17 United States and plaintiffs' counsel reviewed over 40,000 pages of documents the defendant
18 produced. Plaintiffs' counsel also responded to discovery requests propounded by defendant for
19 every one of the 185 remaining plaintiffs and opt-in plaintiffs. The discovery costs alone, which
20 plaintiffs' counsel disbursed, exceeded \$50,000. Finally, it is notable that plaintiffs were
21 informed of the attorneys' fees component of the settlement agreement and all plaintiffs
22 approved.

23 The allocation and settlement of attorneys' fees claimed in the case was the subject of
24 independent negotiation during the settlement conference with Magistrate Judge Beeler.
25 Plaintiffs' counsel had itemized in excess of \$525,000.00 in attorneys' fees which had been
26 tracked in both firms' accounting systems during the administrative and District Court phases of
27 this litigation. In addition, counsel for plaintiffs advanced in excess of \$60,000.00 in litigation
28 costs and expenses during the pendency of the matter. The negotiated \$425,000.00 fee element of

the settlement agreement was a result of additional compromise and negotiation designed to secure the defendant's agreement to enter into the settlement with the individual plaintiffs.

VI. THE SETTLEMENT MERITS FINAL APPROVAL

A. The Class Action Settlement Process

Courts frequently rely on Rule 23 class action jurisprudence to analyze analogous issues in the collective action context. *See, e.g., Halle v. W. Penn Allegheny Health Sys. Inc.*, 842 F.3d 215, 223 (3d Cir. 2016) (“[C]ourts have been left to consider these matters when they arise, frequently borrowing or adapting procedures, concepts, and nomenclature from the Rule 23 class action context.”). Pursuant to Federal Rule of Civil Procedure 23(e), class actions “may be settled, voluntarily dismissed, or compromised only with the Court’s approval.” As a matter of “express public policy,” federal courts favor and encourage settlements, particularly in class actions, where the costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 995 F.2d 1268, 1276 (9th Cir. 1992) (noting the “strong judicial policy that favors settlements, particularly where complex class action litigation is concerned”); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (same); *see also 4 Herbert B. Newberg & Alba Conte, Newberg on Class Actions* §11:41 (4th ed. 2002) (same, collecting cases).

The Manual for Complex Litigation (Fourth) (2004) describes the three-step procedure for approval of class action settlements; (1) preliminary approval of the proposed settlement; (2) dissemination of the notice of the settlement to class members, providing for, among other things, a period for potential objectors and dissenters to raise challenges to the settlement’s reasonableness; and (3) a formal fairness and final settlement approval hearing. *Id.* at §21.63. These procedures have been somewhat circumvented in this case inasmuch as all individual class plaintiffs have personally signed settlement agreements and thereby agreed to the terms and conditions contained therein. Accordingly, this court may grant both preliminary and final approval of the proposed settlement and take notice of the fact that there is no necessity for a period of time for dissemination of notice of settlement to absent class members since no class

1 members are absent from this proceeding. The formal fairness and settlement approval hearing
2 can be concluded within this same process.

3 Plaintiffs and counsel now request that the Court take the third and final step conducting a
4 fairness hearing and granting final approval of the settlement.

5 **B. The Settlement Meets the Ninth Circuit's Standards for Final Approval.**

6 To approve a class action settlement, the Court must determine whether the settlement is
7 "fundamentally fair, adequate and reasonable." *In re Rambus Inc. Derivative Litig.*, No. C-06-
8 3515-JF, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009) (citing Fed. R. Civ. P. 23(e)); see also
9 *Mego Financial Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *Officers for Justice v. Civil*
10 *Service Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "Although Rule 23 imposes strict procedural
11 requirements on the approval of a class settlement, a district court's only role in reviewing the
12 substance of that settlement is to ensure that it is "fair, adequate, and free from collusion." *Lane*
13 *v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d
14 1011, 1027 (9th Cir. 1998)). When class counsel is experienced and supports the settlement, and
15 the agreement was reached after arm's-length negotiations, courts should give a presumption of
16 fairness to the settlement. *See Nobles v. MBNA Corp.*, No. C 06-3723 CRB, 2009 WL 1854965,
17 at *2 (N.D. Cal. June 29, 2009); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal.
18 1980), *aff'd*, 661 F.2d 939 (9th Cir. 1981). Additionally, "[i]t is the settlement taken as a whole,
19 rather than the individual component parts, that must be examined for overall fairness." *Staton v.*
20 *Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

21 The Ninth Circuit has identified "the strength of the plaintiffs' case; the risk, expense,
22 complexity, and likely duration of further litigation; the risk of maintaining class action status
23 throughout the trial; the amount offered in settlement; the extent of discovery completed and the
24 stage of the proceedings; the experience and views of counsel; the presence of a governmental
25 participant; and the reaction of the class members to the proposed settlement as factors for
26 determining whether a settlement is fair, reasonable, and adequate. *See Hanlon*, 150 F.3d at
27 1026. "The relative degree of importance to be attached to any particular factor will depend on
28 the unique circumstances of each case." *Officers for Justice*, 688 F.2d at 625. As discussed

below, all of the relevant factors set forth by the Ninth Circuit for evaluating the fairness of a settlement at the final stage also support final approval, and there can be no doubt that the Settlement was reached in a procedurally fair manner given Magistrate Laurel Beeler's extensive involvement and active guidance and assistance. For these reasons, the settlement merits final approval.

C. The Settlement Is Substantively Fair Because It Provides Significant Benefits in Exchange for The Compromise of Disputed Claims.

As noted in the summary of the settlement terms above, and in the settlement itself, the settlement compensates plaintiffs for the alleged loss of leave and lost earnings arising from the field office closure order. The opt-in plaintiffs support this settlement, as does Defendant and all individual class members who have signed the settlement agreement. It is uncertain whether the class would be able to obtain and sustain a better outcome through continued litigation, trial and appeal, and, in fact, there is a substantial chance that plaintiffs would recover nothing at all.

D. The Settlement Is Procedurally Fair as the Product of Good Faith, Informed, and Arm's-Length Negotiations.

Under the Magistrate Judge's guidance and supervision, the parties entered into a reasoned and well-informed settlement. The settlement terms consider how to appropriately compensate the two types of plaintiffs—current employees and former employees—and what would be adequate consideration for each type.

E. Uniformly, the Class Members Approve the Settlement Terms

The reaction of the opt-in plaintiffs to the proposed Settlement has been overwhelmingly positive. This is evidenced by the fact that all opt-in plaintiffs have signed the settlement agreement. This strong, positive and unanimous reaction provides powerful evidence of the settlement fairness. *See, e.g., Churchill Vill., L.L. C. v. GE*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement with 45 objections and 500 opt-outs from class of 90,000 members, roughly 0.6%); *Chun-Hoon v. McKee Foods Corp.*, 716 F.Supp.2d 848, 852 (N.D. Cal. 2010) (finding that sixteen opt outs in a class of 329 members, or 4.86% of the class, demonstrated an absence of a negative reaction and strongly supported settlement); *Glass v. UBS*

Fin. Serv., Inc., No. C-06-4068-MMC, 2007 WL 221862, at *5 (N.D. Cal. Jan. 26, 2007) (approving settlement with 2% opt-out rate); *Wren v. RGIS Inventory Specialists*, No. C-06-05778-JCS, 2011 WL 1230826, at *11 (N.D. Cal. Apr. 1, 2011) (holding that ‘the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members’) (quoting *Nat’l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)); *see also* *Gerner v. State Farm Mut. Auto. Ins. Co.*, No. C081365 CW (EMC), 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010); *Riker v. Gibbons*, No. 3:08-cv-00115-LRH-VPC, 2010 WL 4366012, at *5 (D. Nev. Oct. 28, 2010) (“the small number of objections is an indication that the settlement is fair, adequate and reasonable”).

VII. CONCLUSION

For the foregoing reasons, plaintiffs, plaintiffs’ counsel, and defendant respectfully request that the Court approve the Stipulated Settlement Agreement.

DATED this 25th day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Clark Hill, and that on this 25th day of May, 2018, I served a true and correct copy of the foregoing **JOINT NOTICE OF MOTION AND MOTION AND MEMORANDUM IN SUPPORT OF COLLECTIVE ACTION AGREEMENT** via the Court's CM/ECF program upon all counsel registered for this specific litigation.

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